Division Bench (5)

CF 1002 1

IN THE HIGH COURT OF JUDICATURE AT BILASPUR, (C.G.)

P.R. No. 5126/06
Presented by Shri Sumita Jain
Dated 13/9/06

W.P.(C) No. 5104 /2006

PETITIONER:

C1 India Pvt. Ltd.
Through its authorized signatory,
Mr.Prem Mohan,(S/OShriR.M.Prasad,
Aged about 33 Years),Having its
Registered office at D-5, Defence
Colony,New Delhi

VERSUS

RESPONDENTS:

1. State of Chhattisgarh
Through its Chief Secretary
Mantralaya,D.K.S.Bhawan,Raipur
(C.G.)

2. Chhattisgarh Infotech & Biotech
Promotion Society (CHiPS)Govt. of
Chattisgarh. R.D.A.
Building,Raipur, (C.G.)

3. NexTenders (India) Pvt. Ltd.
A company incorporated under
the Companies Act Having its
registered office at "Yuchit",
Juhu Tara Road,Mumbai,
Maharashtra

4. Wipro Limited
Having its Registered office at
Doddakannelli, Sarjapur Road
Bangalore - 560035, Karnataka

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PETITION UNDER ARTICLES 226/227 OF THE CONSTITUTION OF INDIA FOR ISSUANCE OF APPROPRIATE WRITS OF MANDAMUS AND CERTIORARI AND FOR OTHER SUITABLE WRITS AND DIRECTIONS:-

Counsel for the Caveator is not available therefore copy sent by courier to Respondent No-2.
13/9/06.
(Prateek Sharma)
Adv.

AFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

D.B. **HON. SHRI JUSTICE VIJAY KUMAR SHRIVASTAVA &**
HON. SHRI JUSTICE DHIRENDRA MISHRA

WRIT PETITION (C) No. 5104/2006

PETITIONER : C1 India Pvt. Ltd
Through its authorized signatory,
Mr. Prem Mohan, (S/O Shri R.M.
Prasad, aged about 33 years) having
its registered office at D-5, Defence
Colony, New Delhi.

VERSUS

RESPONDENTS : State of Chhattisgarh and others

O R D E R FOR CONSIDERATION

Sd/-
Dhirendra Mishra
Judge

HON'BLE SHRI JUSTICE VIJAY KUMAR SHRIVASTAVA, J

Agree - VK

Sd/-
V.K.Shrivastava
Judge

POST FOR ORDER ON 1st ~~JANUARY~~ February 2007

Sd/-
Dhirendra Mishra
Judge

01-02-07

HIGH COURT OF CHHATTISGARH AT BILASPUR

D.B. HON. SHRI JUSTICE VIJAY KUMAR SHRIVASTAVA &
HON. SHRI JUSTICE DHIRENDRA MISHRA

WRIT PETITION (C) No. 5104/2006

PETITIONER	:	C1 India Pvt. Ltd Through its authorized signatory, Mr. Prem Mohan, (S/O Shri R.M. Prasad, aged about 33 years) having its registered office at D-5, Defence Colony, New Delhi.

VERSUS

RESPONDENTS	:	State of Chhattisgarh and others.

Present :

Mr. Vivek Tankha learned Sr. Advocate with Mr. Munish Malhotra & Ms. Sunita Jain for the petitioner.

Mr. Prashant Mishra learned Additional Advocate General for State.

Mr. V.R. Tiwari learned counsel for respondent No.3.

Mr Sanjay K. Agrawal with Mr. Sourabh Sharma, learned counsel for respondent No. 4.

O R D E R
(Passed on 01-2-2007)

Per Dhirendra Mishra, J

By this petition the petitioner is challenging the action of the respondents 1 and 2 whereby they have allowed the respondents 3 and 4 to participate in the tender process despite the fact that they do not qualify for the same and they are intending to issue letter of intent/purchase order in their favour.

2. The State of Chhattisgarh assigned the respondent No.2 the responsibility for permitting own technology system within the

State Government and arranging procurement own technology related material for whole of the State. Respondent No.2 to implement the e-procurement, floated the tender vide advertisement dated 20.2.2006 in which 6 parties including the petitioner and respondents 3 & 4 participated. The tender was to be opened in three parts (i) Pre-qualification (ii) Technical and (iii) Financial.

3. The relevant portion of Annexure P-2, clause 4.5.2 the pre-qualification criteria for the purpose of controversy involved in this petition is reproduced as under:

"Considering the wide variety of skills and resources needed to implement the Procurement Project, a consortium of Companies (maximum of 2) may bid for the project. One of the members of the consortium should act as the Prime Bidder and shall be responsible to CHIPS for discharging of all responsibilities related to the Bid finalization and project (if selected as the vendor). The other members of the Consortium or Group shall be called as sub-contractors. The Prime Bidder should submit all the bids. The pre-qualification criteria or the participating bidders are as given below:

In case of consortium bids, the number of consortium members shall not exceed 2. The owner of the e-Procurement application proposed to be deployed in the project should be one of the necessary partners of the consortium.

<u>The owner of the e-procurement application should be a SEI-CMM level 3 certified Company</u>.

2. The grievance of the petitioner is that the petitioner, the owner of the e-procurement application with prime bidder ITI Ltd

participated in the tender process along with 5 other participants namely Tech. Mahindra Ltd. + SAP (India) Pvt. Ltd,(consortium), Stock Holding Corporation of India Ltd. + WEB3M India Pvt. Ltd. (consortium), ITI Ltd. + C1 India Pvt. Ltd. (consortium), Raipur Rotocast Ltd + Antares System Ltd. (consortium), Wipro Ltd. + NexTenders (India) Pvt. Ltd. Consortium and Sai Infosystem (India) Pvt. Ltd. At the pre-qualification stage the respondents 3 and 4 were short listed even though respondent No.3 – the owner of the e-procurement application proposed to be deployed was not SEI-CMM level 3 certified company and therefore it could not be considered for the purpose of present tenders and respondents 3 and 4 could not be short listed in the said process. The other short listed company apart from the consortium of respondents 3 and 4 were the petitioner and the ITI Ltd and SAI Infosystem (India) Pvt. Ltd + Applitech Solutions Ltd. The other participants namely Tech. Mahindra Ltd and SAP (India) Pvt. Ltd. (consortium) as well as M/S Raipur Rotocast Ltd along with M/S Antares System Ltd (consortium) were rejected by the respondent No.2 on this ground alone considering the requirement of SEI-CMM level 3 certificate the mandatory condition for participating in the tender process.

3. The further grievance of the petitioner is that as soon as it came to their notice that the respondents 3 and 4 have been short listed after pre qualification, vide letter dated 30.7.2006 (Annexure P-3), they apprised the respondents 1 and 2 that respondents 3 and 4 (consortium) are not qualified to participate in the tender process as they did not fulfill the prescribed eligibility criteria and

earlier also they were disqualified by the Government of Karnataka in the month of May 2006 on the same ground. The above objection was considered in the meeting dated 31.7.2006. Empowered Committee and the respondents 1 and 2 proceeded further in opening technical bid of respondents 3 and 4 with other short listed parties.

4. In their return the respondent No.2 has contended that e-procurement development activity was initiated in the month of March 2005 as per the National e Governance Plan conceived by the Government of India and identified as a Mission Mode Project (MMP). For the purpose of policy decisions in relation to implementation of the Project, the Government of Chhattisgarh had constituted an Empowered Committee (EC), consisting of 14 senior officers with Chief Secretary as Chairman. After extensive ground work detailed request for proposal (RFP) was prepared for the various activities to be undertaken by the Government. The bid process activity commenced from 21.2.2006. Bids were to be submitted upto 29.5.2006 upto 16 hours and the pre qualification bids were opened at 17 hours on the same day. The evaluation of the pre-qualification bids was done on 31.7.2006 after certification on prequalification bids by the empowered committee. On the same day the affidavits from the bidders were sought. 3rd Meeting of the Bid Evaluation Committee was convened on 11.8.2006 and on that date the names of the pre qualified bidders were declared. Declaration of technically qualified bidders was made on 25.8.2006 and on that date commercial bids were also opened. On 29.8.2006

Empowered Committee gave its decision on technical and commercial bids and thereafter letter of intent was issued on 4.9.2006. Issue raised by the petitioner with respect to pre qualification of the Wipro – Nextender, the respondents 3 and 4 herein, was meticulously examined by the Empowered Committee on 31.7.2006 in the presence of the representatives of the participants/ tenderers including the petitioner and after considering the affidavits filed on behalf of respondents 3 and 4 the empowered committee was satisfied that the respondents 3 and 4 were qualified to participate in the tender process, upon submission of affidavits regarding ownership of the entire e-procurement application to be deployed in the Government of Chhattisgarh, It was further decided that if the information provided in the affidavit is found untrue at any stage, the consortium of respondents 3 and 4 shall be summarily disqualified from the e-procurement bid evaluation process.

5. The respondents 3 and 4 in their separate reply have categorically taken a stand that consortium of respondents 3 and 4 meets the pre qualification criteria as the respondent No.4 is SEI-CMM level 5 certified company. Apart from the above assertion all the three respondents have submitted preliminary objections to the effect that the petition suffers from latches of delay. The evaluation of pre qualification bid was undertaken on 11.8.2006 vide Annexure R-4 and on the basis of affidavits of respondents 3 and 4 they were held to be qualified to participate in the tender process. Thereafter technical bid was considered on 25.8.2006 and

respondents 3 and 4 were found to be technically qualified for opening of commercial bid and thereafter commercial bid was opened on 29.8.2006 vide Annexure R-6 and considering the rates quoted by respondents 3 and 4 which was Rs. 2.38 crores less than the rate offered by the petitioner, the offer of respondent No.3 was approved and thereafter the instant petition has been filed on 13.9.2006 after being unsuccessful in the tender process.

6. The ITI Ltd is the prime bidder. As per clause 4.5.2 of the pre qualification criteria, Prime Bidder is responsible to CHIPs for discharging of responsibility related to bid finalization and Project (if selected as the vendor) and other members of the consortium or groups shall be termed as sub contractors. The bid is to be submitted by the prime bidder. However, the prime bidder has accepted the decision of the respondents 1 and 2 in holding the respondents 3 and 4 as pre qualified bidder, and the instant petition filed at the instance of the sub contractor is not maintainable.

7. We have heard counsel for the parties and perused the material available on record.

8. The objection raised by the petitioner against the pre qualification of respondents 3 and 4 to participate in the tender process may be summarized as under:

(a) The respondent No.3 - NexTenders (India) Pvt. Ltd is the owner of e-procurement application proposed to be deployed whereas respondent No.4 is the prime bidder. As

344

per clause 4.5.2 the owner of the e-procurement application should be a SEI-CMM level 3 certified company. However, the respondent No.3 does not possess the above certification and therefore, consortium of respondents 3 and 4 were not qualified.

(b) Considering the above criteria mandatory for participating in the tender process, the respondents No. 1 and 2 disqualified the other participants.

(c) The petitioner as a member of consortium disputed the affidavits of Annexures R-2 and R-3 sworn by representatives of respondents 3 and 4 wherein they have stated that Wipro Ltd. Is the sole, undisputed and absolute owner of the intellectual property rights of the e-procurement application deployed by Wipro in Municipal Corporation Delhi and the other latest versions proposed to be deployed in the Government of Chhattisgarh under the aforesaid tenderers. The petitioner is basing his challenge to the above affidavits on the service agreement between respondents 3 and 4 of Annexure P-8 dated 22.2.2005 which shows that they share ownership of intellectual property in the deployment of EGPS by Wipro in Municipal Corporation Delhi. Annexure P-10, web site of the Respondent No.4 shows the respondent No.3 as the owner of Tools and Technology of e-procurement application customized in Municipal Corporation, Delhi. The offer of M/s Wipro Ltd was rejected by the

Government of Karnataka on the sole ground that it does not have its own software.

(d) In 2006 in an arbitration proceeding before the Ex Chief Justice of India, the respondent No.3 filed an affidavit that he owns the intellectual property rights whereas in the present case an untrue affidavit has been sworn by respondents 3 and 4 that ownership of the e-procurement application stands transferred to the respondent No.4 as per the agreement between them.

(e) Even after taking decision vide Annexure R-1 that the respondent No.4 to submit affidavit without any qualification that he is sole and undisputed owner of the entire e-procurement application to be deployed in Government of Chhattisgarh, respondents 1 and 2 have acted upon the affidavits of Annexures R-2 and R-3 without any independent verification despite inconsistencies mentioned hereinabove have been brought to their notice.

9. On the other hand the submission of the respondents in this regard is that the decision on the above objections of the petitioner was considered threadbare and thereafter it was decided that the respondents No. 3 and 4 be asked to submit the affidavit with respect to the ownership of the entire e-procurement application proposed to be deployed in Government of Chhattisgarh, and if the above affidavits are found to be untrue, consortium shall be summarily disqualified

346

from bid evaluation process and with this pre condition respondents 3 and 4 were treated as qualified on pre qualification criteria subject to satisfactory affidavit.

10. After the above decision the respondent No.3 has categorically stated in its affidavit that Wipro Ltd is the sole and undisputed owner and NT has royalty free licencing rights from Wipro Ltd to exploit the intellectual property rights of the e-procurement software deployed in Municipal Corporation, Delhi and proposed to be deployed in Government of Chhattisgarh. In its affidavit dated 19.6.2006 the respondent No.4 has stated identical facts and has further referred to an agreement between Wipro and NT effective from 31.3.2005 referred to as (amendment to the alliance agreement) whereby NT has agreed to assign to Wipro for a consideration, receipt of which has been acknowledged, the IPRS of the modules developed or under development by either party (whether stand alone or integrated in any manner or form as a solution) of the Alliance's proposed version 2 Electronic Government Procurement System (EGPS) and by this agreement it has been categorically agreed that all the rights, title and interest in IPRS of version 2 of the EGPS as per the Schedule set out in clause 6 below, including any enhancement/customizations thereof made by either party shall henceforth be assigned exclusively to Wipro and governed by amended clause 4.1 of the C-L Agreement.

11. There is no dispute that intellectual property rights of the e-procurement application may be assigned by its developer

to a third party and there is no specific mode of effecting such assignments and the same can be done by way of agreement. In the instant case, the objection of the petitioner with respect to the pre qualification of respondents 3 and 4 to participate in the tender was based on allegations that respondent No.3 is the owner of the e-procurement application who admittedly does not possess SEI-CMM level 3 certificates. Respondent No. 4 is not the owner. Respondents 1 and 2 have accepted the affidavits of the respondents 3 and 4 and have recorded their satisfaction that respondent No.4 Wipro Ltd is the owner of e-procurement application and it is also possessed of SEI-CMM level 5 certificate which is much higher than the pre qualification prescribed in the present tender process. It has been stated in the affidavits by both the parties i.e. respondents 3 and 4 that the respondent No.4 is the owner which has not been disputed by respondent No.3. The above assertion is based on agreement between the two for consideration. The whole exercise of considering the objections of the petitioner was done in the presence of the petitioner in the meeting of the empowered committee held on 31.7.2006. The above assertion in the affidavits also finds support from the service agreement of Annexure P-8 dated 22.2.2005 filed by the petitioner himself wherein the respondent No.3 in pursuance of the agreement has expressed its No Objection for Wipro Ltd asserting the ownership rights in the intellectual property of the EGPS for the effective deployment of EGPS by Wipro in Municipal Corporation of Delhi and its Division/Associates or in any

348

department of the State Government of Delhi. Subsequent to this agreement respondents 3 and 4 have referred to the agreement entered into between them whereas the IPRs in e-procurement application has been assigned by NexTenders to Wipro Ltd for consideration. Apart from this respondent No.1 has also field a certificate issued by the Municipal Corporation of Delhi along with its additional return as Annexure R-9 in which M/s Wipro Ltd has been shown as the owner of version 2 of the software supplied and installed and working commercially in the Municipal Corporation of Delhi.

12. It is a settled law that principle of judicial review would apply to the exercise of contractual powers by the Government bodies in order to prevent arbitrariness or favouritism. However, there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 of the constitution of India if the Government tries to get the best person or the best quotation.

13. In the matter of **Tata Cellular Vs. Union of India reported in (1994) 6 SCC 651** the Supreme Court has held thus:

"77. The duty of the Court is to confine itself to the question of legality. Its concerned should be :

1. Whether a decision-making authority exceeded its powers?
2. Committed an error of law,
3. committed a breach of the rules of natural justice,
4. reached a decision which no reasonable tribunal would have reached or,
5. abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(a) Illegality: This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(b) Irrationality, namely, Wednesbury unreasonableness.

(c) Procedural impropriety."

In the abovementioned the Supreme Court has further held that:

"94. The principles deducible from the above are:

(1) The action modern trend points to judicial restraint in administrative action.

(2) The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be

substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle or reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

14. We shall examine the present facts of this case based on above principles. The petitioner, the owner of e-procurement application in association with ITI Ltd – a Public Limited Company, prime bidder participated in the tender process. Prime bidder who is responsible to CHIPs towards their discharge of duties to respondents 1 and 2 has accepted the decision by not preferring any challenge. The petitioner who is a sub contractor has filed this petition solely on the ground that respondent No.3 is in fact owner of the e-procurement application and the respondent No.4 is not the owner. As per the prequalification criteria the owner of e-procurement

351

application has to have SEI-CMM level 3 certificate ;and therefore, the consortium of the respondents 3 and 4 together were not qualified to participate in the tender process. This objection has been considered threadbare in the light of the clarification submitted by the respondents 3 and 4 through affidavits and after considering respondent No.4 to be the owner, this consortium has been held to be qualified.

15. It is not in dispute that respondents 3 and 4 as also the consortium of the ITI Ltd , the prime bidder and the petitioner were the only two qualified participants in the tender proceedings. It is also not in dispute that the offer given by the petitioner ITI was approximately 2.5 times more than the rate offered by respondents 3 and 4.

16. The Supreme Court in the matter of **Reliance Airport Developers Pvt. Ltd. Vs. Airport Authority of India** reported in **JT 2006 (10) 424** has considered the distinctions in the parameters for judicial review in the matter of contract for normal case of tenders and in the case of commercial contracts. The relevant paragraphs are reproduced as under:

> "91 – It is pointed out by learned counsel for the respondents that parameters for judicial review are different in the matters of contract for normal case of tenders. In case of commercial contracts the normal contractual matters are excluded. It is pointed out that there is no overwhelming public interest involving such matters. GETE had only touched the fallacious approach of EC to make the process transparent. The view taken is a possible

852

> view supported by reasons and there should not be any interference"
>
> "92 In the ultimate, the question would be whether in the process of selection the Government had adopted transparent and fair process."

The subject matter of the present tender process also relates to commercial contracts and the empowered committee has taken a decision by adopting transparent and fair process.

16. The decision of the empowered committee in accepting the affidavits of the respondents 3 and 4 is to be seen in the light of the fact that apart from present petitioner, respondent 3 and 4 were only the qualified bidders in case their affidavits were accepted.

Considering the above contingency it has been held by the Supreme Court in the matter of *Reliance Airport Developers Pvt. Ltd Vs. Airport Authority of India (supra)* has held thus:

> "95. If the RPF was to consider at the final phase of evaluation there would be only one bid for each of the airports. In that event, there would be no question of finding out difference between the various bids or comparing bids. That left no option with the EGOM but to either vary RFP or to award one of the airports to GMR and to cancel the process for the second or cancel the entire process. The letter course would not have been in larger public interest. Therefore, the EGOM exercised its opinion.

"96. In final analysis, what the EGOM has done is to accept the report of EC subject to validation done by GETE."

In the above judgment in paragraphs 97 and 100 considering the extent of judicial review in the matters of relating to award of contract it has been held thus :

"97. The extent of judicial review in a case of this nature where the texture cannot be matched with one relating to award of contract, the observations of this Court in Raunaq International Ltd. V. I.V.R. Construction Ltd. And others are relevant. It was observed as follows:

"13. Hence before entertaining a writ petition and passing any interim orders in such petitions, the Court must be carefully weight conflicting public interests. Only when it comes to a conclusion that there is an overwhelming public interest in entertaining the petition, the court should intervene."

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"100. Same would be available only if public law element is apparent which would arise only in a case of "bribery, corruption, implementation of unlawful policy and the like". In the case of commercial contract, the aforesaid view about wandering was noted. In paras 50 and 51 it was noted as follows:

"It does not have the material or expertise in this context to second guess the judgment of the panel. Furthermore, this process is even more clearly in the realm of commercial judgment for the defendant, which judgment cannot properly be the subject of Public Law Challenge on the grounds advanced in the evidence before me."

17. In the present case also there is no public interest involved for entertaining the petition and it is not a case of bribery, corruption, implementation of any unlawful policy etc.

18. Thus the decision of respondents 1 and 2 in holding the consortium of respondents 3 and 4 to be qualified considering respondent No.4 to be the owner of the e- procurement application cannot be held to be unreasonable or arbitrary or the same is affected by bias or actuated by mala fides. The whole evaluation process was done by an empowered committee of 14 senior officers of the State Government in a most transparent and fair manner in the presence of representatives of the participants of the companies in the tender process including the petitioner.

19. Thus in view of the aforesaid discussion, we are of the considered opinion that there is no substance in the petition and the same is therefore liable to be dismissed. It is hereby dismissed with cost.

Sd/-
V.K.Shrivastava
Judge

Sd/-
Dhirendra Mishra
Judge